IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF ALABAMA
NORTHERN DIVISION

DANIEL BRYAN KELLY,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**CIVIL ACTION NO.: 2:05-cv-1150-T**
	)	
RICKY OWENS, et al.,	)	
	)	
Defendants.	)	

DEFENDANTS' JOINT MOTION TO CONTINUE TRIAL

COME NOW the Defendants in the above-styled cause, and move for a continuance of the trial date currently set for January 28, 2008. As the reason for so moving, Defendants set forth and state as follows:

1. This case is set for trial on January 28, 2008. It is the first trial setting.

2. Currently pending before the Court are two Motions for Summary Judgment. (Docs. 103, 104, 105, 106, 107.) Together the motions and supporting materials seek dismissal of all the remaining claims against all of the remaining Defendants.

3. Both of the pending Rule 56 motions are based upon qualified immunity. The United States Supreme Court has made it abundantly clear that immunity is "an *immunity from suit* rather than a mere defense to liability." Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (emphasis in the original). The purpose of immunity is to "avoid 'subject[ing] government officials either to the costs of trial or to the burdens of broad-reaching discovery.'" Id. (quoting Harlow v. Fitzgerald, 457 U.S. 800, 817-18 (1982)). "Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery." Id. (citing Harlow, 457 U.S. at 818). ***The***

benefits of immunity are lost if a case is erroneously allowed to go to trial. Id.; see also Siegert v. Gilley, 500 U.S. 226, 232-33 (1991).

4. In light of this, denial of qualified immunity in a dispositive motion entitles an official to an interlocutory appeal as of right. Mitchell, 472 U.S. at 530 ("[W]e hold that district court's denial of a claim of qualified immunity, to the extent that it turns on an issue of law, is an appealable 'final decision' within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment."); see also Walker v. Schwalbe, 112 F.3d 1127, 1130 (11th Cir. 1997) ("A defendant may interlocutorily appeal a district court's holding that he is not entitled to qualified immunity.")

5. As of the filing of this motion, the Court has not yet ruled on the motions for summary judgment. This case may very well be "erroneously allowed to go to trial" without a continuance.

6. Furthermore, all parties will be prejudiced without a continuance. With trial only a few days away, the parties, including these Defendants who are entitled to qualified immunity, have had to prepare witness lists, exhibit lists, voir dire questions, jury instructions, and motions in limine. At least one of the Defendants will have to come from out of state to be here on January 28, 2008. Other witnesses will have to come from outside the Montgomery area at the expense of the parties subpoenaing them, and the cost of the witnesses' time and effort.

7. Defense counsel contacted the Plaintiff's attorney prior to the filing of this motion, but the Plaintiff's counsel did not give an opinion on the motion – preferring to see how the case developed before deciding whether to oppose or agree to the request.

WHEREFORE, premises considered, Defendants move for a continuance of the trial date of January 28, 2008.

Respectfully submitted this 24th day of January, 2008.

s/Gary L. Willford, Jr.
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CERTIFICATE OF SERVICE

I hereby certify that on this the 24th day of January, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the following: **Richard J. Stockham, III**.

s/Gary L. Willford, Jr.
OF COUNSEL